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IN THE

Supreme Court Of the United States

October Term, 1964

No. 439

JACK LEWIS KATZ,
Petitioner,

versus

C. C. PEYTON,
Respondent.

PETITION FOR A REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES FOURTH CIRCUIT COURT OF APPEALS

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner respectfully prays rehearing be granted on a writ of certiorari to review the decision and judgment

of the United States Fourth Circuit Court of Appeals (Appendix A) affirming a decision and judgment of the United States District Court for the Eastern District of Virginia (Appendix B), and the Supreme Court of Appeals of the State of Virginia.

OPINION BELOW

The Supreme Court of Appeals of the State of Virginia rendered no formal opinion. The United States District Court for the Eastern District of Virginia rendered a formal opinion set forth in Appendix B; however, to the knowledge of the Petitioner, has not yet been reported.

The opinion of the United State Fourth Circuit Court of Appeals is set forth in Appendix A and to the knowledge of the Petitioner has not been officially reported. The opinion of the United States Fourth Circuit Court of Appeals was rendered June 22, 1964.

Writ of Certiorari: Denied on November 16, 1964.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to the provisions of Articles 6 and 14 of the United States Constitution. Constitutional provisions referred to are set forth in Appendix C.

QUESTIONS PRESENTED

This Petition for Rehearing raises the question heretofore available but not specifically relied on; Whether or

not under the Sixth Amendment to the United States Constitution the Petitioner had a right to be confronted with the witness against him and whether or not the failure of the State to produce such a witness resulted in his unlawful conviction, the crime of grand larceny.

STATEMENT OF FACTS

On the 29th day of September 1962, at the Safeway Store, 2300 North Harrison Street, Arlington County, Virginia, an unknown customer drew the attention of Mr. Snyder, the Safeway manager, to the Petitioner, Jack Lewis Katz. The Petitioner at the time, bought about $5.00 worth of groceries, paid for them and left the store. The manager called Officer Harding of the Arlington County Police Department, and who is also a part-time employee of the Safeway Store, who arrived shortly thereafter on the scene. The manager gave the description of the Petitioner to Officer Harding and the officer proceeded in a search of the area to find the Petitioner.

During his search, he was joined by Detective Cauffman of the Arlington County Police Department. In the meantime, Officer Harding had found an automobile which had several bags sitting on the floor near the back seat of the car. He could not tell from looking into the car what was in the bags, nor did he know who the car belonged to.

The Petitioner, Jack Lewis Katz, was spotted in a telephone booth and Detective Cauffman and Officer Harding approached the telephone booth. They asked the Petitioner for identification and according to the testimony of Detective Cauffman, the Petitioner was placed under arrest there for shoplifting and was taken to the police cruiser.

Petitioner was asked if the car belonged to him. Petitioner denied that he owned the car. Petitioner was searched and a set of car keys was taken from his person by Detective Mackey of the Arlington County Police Department. Detective Mackey then searched the automobile in question and on searching the automobile, found that the automobile contained 256 cartons of cigarettes identified as having come from two (2) Safeway Stores in Arlington County, Virginia.

Police Officer Harding testified that after Petitioner was placed in the police cruiser and after the search had been consummated, Petitioner was placed under arrest for grand larceny and Officer Harding warned Petitioner of his constitutional rights to remain silent.

Detective Cauffman testified that Petitioner was under arrest at the telephone booth for shoplifting that Cauffman was with the Petitioner from that point on until the Petitioner was taken before a special commissioner in Arlington County, Virginia, and at no time to Cauffman's knowledge was the Petitioner warned of his constitutional rights and further, that at no time did the Petitioner give permission for his person or his car to be searched.

Detective Cauffman further testified that he was aware that there was a special commissioner on duty in Arlington County, 24-hours a day, who could issue a search warrant, that there was a total of four (4) police officers at the scene and that no police officer made an attempt to obtain a search warrant.

The Safeway Store manager testified that a female customer had brought his attention to the Petitioner; that he did not know her before, did not know her now, nor did not know where she could be found.

The Safeway manager testified as to the retail value of the cigarettes, as did Officer Harding, a part-time employee; at no time could they testify or would they testify as to the costs to Safeway Stores of the cigarettes or as to whether or not the cigarettes had been sold or stolen and if so, on what date. They could not testify as to the date that the cigarettes arrived at the store, nor could they testify as to the date the cigarettes left the store.

THE MANNER IN WHICH THE FEDERAL QUESTION IS RAISED

The Federal question was raised in the Arlington County Circuit Court, the Supreme Court of Appeals for the State of Virginia, the United States District Court for the Eastern District of Virginia, and the United States Fourth Circuit Court of Appeals, and in each court it was determined that no right of the Petitioner had been infringed. See Appendix

REASONS FOR ISSUANCE OF THE WRIT

It is submitted that this Petition raises a substantial question regarding the Federal Constitution which is of general importance and that to allow the conviction to stand would be a gross miscarriage of justice.

The Sixth Amendment to the United States Constitution says among other things that in all criminal prosecution the accused shall enjoy the right to be confronted by the witnesses against him. See Appendix C. This right shall be enjoyed not if they can be produced, nor if they be within the jurisdiction, but absolutely and on all occasions. *U. S.* v. *Angell*, C.C.N.H. 1881, 11 F. 34.

The right of confrontation did not originate in the Commonwealth of Virginia nor in the Federal Constitution, but was a common law right which was included in the Federal Constitution in the form of the Sixth Amendment. *Salinger* v. *U. S.*, S.D. 1926, 47 S.Ct. 173, 272 U. S. 542.

In addition, a defendant in a criminal case is entitled to be confronted by all witnesses against him and this is a common law right carried into the Federal Constitution by the Sixth Amendment. *U. S.* v. *Barracota*, D.C.N.Y. 1942, 45 F.Supp. 38.

This constitutional provision was designed in reference to criminal evidence to bring forth those facts within the personal knowledge of the witness, to be testified in open court in the presence of the accused. Although the main and essential purposes of confrontation of witnesses adverse to accused in criminal prosecution, as provided for in this amendment, is to secure to the accused *the opportunity of cross examination*, there is a secondary advantage of enabling the judge and the jury to obtain the elusive and incommunicable evidence of a witness' deportment while testifying plus a certain subjective moral effect upon the witness and it further protects the defendant in criminal prosecutions against *ex parte* testimony. *State* v. *Gaetano*, 1921, 114 A. 82, 96 CONN. 306, 15 A.L.R. 458; *State Ex. Rel. Gladden* v. *Lonergan*, 1954, 269 P.2d. 491, 201 OR. 163; *Harris* v. *Com., Ky.*, 1958, 315 S.W.2d. 630.

The failure of the trial court to require such witnesses to attend is a basic violation of the Sixth Amendment and is a denial of due process of the law under the 14th Amendment. (See Appendix C.)

Applying the above fundamental rules of law to the instant case we find from the record that not one witness was produced by the commonwealth who could testify that the cigarettes in question were stolen.

The commonwealth called as witnesses, managers Snyder and Brent as to these alleged stolen articles. The record is clear and unequivocal that these two witnesses did not know if the cigarettes in question were in fact taken without having been purchased. (See Appendix 1-D.)

In this case we do not even have the benefit of forbidden *ex parte proof*. We don't even know who informed the managers of these stores that the cigarettes were stolen.

It is submitted in good faith and we have asked every court that this case has gone to, where in the record is the testimony that the articles in question in this case were in fact stolen articles? We ask this Court, who are the accusers in this case? Certainly it can't be the store managers because they don't know and they said so in testifying. It can't be the police officers themselves, because they certainly did not testify to such effect, but only that they found a certain number of cigarettes in the accused's automobile.

Cigarettes, to the knowledge of the Petitioner, is not contraband and there is nothing inherently illegal in the ownership of either one carton of cigarettes or one thousand cartons.

From the record, therefore, one must conclude that this Petitioner was convicted on sheer utter speculation; that no witness was brought forward to testify that this Petitioner stole the cigarettes or in fact whether or not the cigarettes in question were stolen property.

This Petitioner has a right under the Sixth and 14th Amendments of the United States Constitution to confront such a witness if in fact such a witness exists, other than in the figment of someone's imagination, and the Petitioner

further submits that this becomes quite obvious to anyone who would take the trouble to read the record.

We further submit that there are some exceptions to the heresay rule which the Sixth Amendment does not prevent, but included in these is not idle speculation.

CONCLUSION

The Petitioner therefore concludes that to deny him his writ as prayed for is to deny him his right under the Sixth and 14th Amendments to the United States Constitution, and would, in effect, perpetuate a gross miscarriage of justice.

Respectfully submitted,

Stanley D. Perry

STANLEY D. PERRY
Attorney for Petitioner

CERTIFICATE OF GOOD FAITH

I, Stanley D. Perry, do certify that this Petition is in good faith and not for delay and do further certify that the Petition is restricted to substantial grounds available to the Petitioner although not previously presented.

Stanley D. Perry

Stanley D. Perry
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Stanley D. Perry, Attorney for the Petitioner, hereby certify that I have on the 8th day of December 1964, mailed with first class postage prepaid, a copy of the aforegoing Petition for Writ of Certiorari with Appendix attached, to RENO S. HARP, III, Esquire, Asst. Attorney General for Commonwealth of Virginia, Supreme Court Building, Richmond, Virginia, and PETER J. KOSTIK, Esquire, Asst. Commonwealth Attorney for Arlington County, Arlington, Virginia.

STANLEY D. PERRY
Counsel for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9377

Jack Lewis Katz,
Appellant,
versus
C. C. Peyton,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA. OREN R. LEWIS, DISTRICT JUDGE.

(Argued June 16, 1964. Decided June 22, 1964.)

Before SOBELOFF, Chief Judge, HAYNSWORTH, Circuit Judge, and MICHIE, District Judge.

Stanley D. Perry for Appellant, and Reno S. Harp, III, Assistant Attorney General of Virginia, (Robert Y. Button, Attorney General of Virginia, William J. Hassan, Commonwealth's Attorney for Arlington County, and Peter J. Kostik, Assistant Commonwealth's Attorney for Arlington County on brief,) for Appellee.

HAYNSWORTH, Circuit Judge:

This prisoner sought habeas corpus upon the ground that he was convicted in the state court on evidence obtained as a result of an illegal search. The District Court found that the search was incident to a lawful arrest. We

agree and need add little to what the District Court said in its opinion.[1]

One afternoon in September, 1962, the petitioner Katz, managed to remove some 256 cartons of cigarettes from two supermarkets without paying for them. Packed in market bags, sixteen cartons to the bag, the cartons of cigarettes were stored in the trunk and the rear compartment of his automobile. While engaged in the removal of the last 26 cartons from a Safeway store in Arlington, Virginia, however, Katz excited the attention of another customer in the store. The customer, otherwise unidentified, reported to the Manager that she had seen a man repeatedly entering the store and leaving with bags of cigarette cartons, and, when Katz again returned to the store, he was pointed out by the customer as the individual who had been removing cigarettes. The Manager then kept Katz under close observation until he left, passing through the checkout counter and paying for the few articles, including two cartons of cigarettes he then had with him.[2]

The Manager and the Assistant Manager, however, continued to keep Katz under observation, and police officials were summoned. A quick check of the cigarette counters disclosed that the stock was unusually low, and an automobile in the parking lot of the store was observed in which a number of laden market bags from the supermarket was stored on the floor of the rear compartment. These bags were covered with newspapers and other articles, so that their contents could not be observed from one side of the automobile. They were not fully shielded by the protective covering, however, so that from the other side of the auto-

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[1]Katz v. Peyton, E.D. Va., F. Supp.

[2]He was under close observation after he entered the store the last time and, apparently, was aware of it.

mobile, it could be seen that two bags of these bags contained cartons of cigarettes. These were observed by the Assistant Manager of the store and one of the police officers.

Meanwhile, Katz was seen approaching the automobile repeatedly from several different directions, retiring each time when he saw that the store manager, and later police officials, were standing near the automobile. On the last occasion, he retired to a telephone booth and there remained, not undertaking to use the telephone in any way, until police officials finally approached him.

Katz first denied ownership of the vehicle, but, when he was placed under arrest for shoplifting and a search of his person disclosed the registration card for the automobile and its keys, Katz then announced that he was indeed the owner of the automobile and that it was laden with cigarettes. He professed gladness that his carrer of shoplifting was at an end.

The principal question is whether or not there was probable cause for the arrest, for the search of the petitioner's person and, immediately thereafter, of his automobile after Katz's announcement of its contents, seems plainly reasonably incident to the arrest, if the arrest was lawful.

Katz ignores completely the unidentified customer's report to the Manager of the store that Katz had been seen repeatedly entering and leaving the store, carrying with him each time he left cartons of cigarettes, for which he had not paid. He contends that, since the reliability of the unknown informer was originally unknown and untested, the police officials had no right to place any reliance upon it, even to the extent of undertaking further investigation.

That is not the rule when later testing, before arrest, establishes the reliability of the informant's report. Though the informant's identity remains unknown, the reliability of the report was made manifest before the police acted.

Information from anonymous informants, or from those whose identity or reliability is unknown, or from informants who are known to be unreliable, cannot of itself furnish a basis of probable cause for arrest. Such information, though it has within itself no badge of trustworthiness, may, however, form a basis of probable cause for arrest if it is corroborated in essential particulars or is verified in essential parts by investigation before the arrest. This we specifically held in United States v. Irby, 4 Cir., 304 F.2d 280.

The information which the store manager obtained from the customer that Katz had been extracting cartons of cigarettes from the store without paying for them was sufficiently corroborated when bags were seen in the rear of the automobile, and the officer saw that the bags contained some cartons of cigarettes and the bags appeared to have been stuffed to their capacity with containers of the same size and shape. The information obtained further corroboration when Katz was seen repeatedly approaching that automobile, only to retire when he saw that it was being watched and attended by the storekeeper or police officers.

The customer's report would not alone furnish probable cause for arrest. The police did not act upon it alone. They acted only after their own investigation had given substance and verity to the original report. Collectively, all the information the police had when they acted furnished probable cause for the arrest.

Affirmed.

APPENDIX B

MEMORANDUM OPINION

Jack Lewis Katz was convicted of grand larceny in the Circuit Court of Arlington, Virginia, and sentenced to a term in the Virginia State Penitentiary. Having exhausted his state remedies, he now seeks his release in this Court by writ of habeas corpus on the ground that the judgment and sentence thus imposed are illegal and in contravention of the rights secured him by the Fourth and Fourteenth Amendments of the Constitution of the United States.

He assigns as error the admission of evidence obtained as a result of an unlawful search and seizure of his automobile; unlawful arrest (he concedes that if the arrest was lawful, the search and seizure was lawful); and the admission in evidence of "statements" made by him to the arresting officers before being advised of his constitutional rights.

The case was submitted upon the record made in the State court, no additional testimony being offered during the hearing before this Court.

Circumstances leading to the arrest of the defendant, the search of his automobile, and the seizure of the cigarettes were as follows:

On or about September 29, 1962, at the Safeway Store located at 2300 North Harrison Street, Arlington, Virginia, an unidentified customer indicated to the manager, Howard Snyder, that she had seen a man repeatedly entering and leaving the store carrying out bags containing cartons of cigarettes without paying for them and placing them in a car. The customer pointed out the man (defendant Katz),

who was then at the cigarettes display. Both the manager and the assistant manager, Alton Dewey, observed Katz going through the check stand with one of two cartons of cigarettes and some other items purchased in the ordinary course of business. They personally did not see him take any articles from the store without paying therefor.

The defendant then proceeded across Harrison Street and entered several stores. Snyder went out to the parking lot where he found a car, with District of Columbia tags, containing several bags marked "Safeway Stores" placed on the back floor. The bags were covered with lunch sacks and newspapers so that he was unable to discern their contents. He then returned to the store and phoned Officer H. E. Harding of the Arlington County Police also a part-time employee of Safeway. Thereafter Snyder checked his cigarette stock and found certain brands unusually low.

Dewey, the assistant manager, also went out to the car under observation and he says cigarettes in one of the bags were definitely visible. He remained there and kept the defendant under surveillance. Katz returned from across the street, walked north where there are no stores. He was next seen on Lee Highway approaching the Safeway from an easterly direction. As he neared the car where Dewey was standing, he turned around and proceeded back down (west) Lee Highway.

Officer Harding arrived and was given a description of the defendant by Dewey. He called headquarters and waited at the car under observation until Detectives Cauffman and Mackey arrived in a cruiser. Cauffman testified that he definitely saw a corner of one of the cartons of cigarettes on the floor in the back of the car in question. Harding testified he saw the bags but not what they contained; however, he said he knew from previous experience in apprehending a

shoplifter that approximately sixteen cartons could be placed in one bag. There being two bags, he figured the value of the cigarettes in excess of $50.00, the statutory prerequisite for grand larceny in Virginia.

Detective Mackey remained with the cruiser on the Safeway parking lot while the other two officers proceeded to search for the defendant. A man matching the description given was found standing in a phone booth on Lee Highway about a block west of the Safeway Store. The Officers identified themselves, and when the defendant refused to voluntarily return with them to the cruiser, Detective Cauffman placed him under arrest for shoplifting. When they arrived at the cruiser Officer Harding charged him with grand larceny. Upon questioning, the defendant denied ownership of the car, but when asked to place his belonging on the trunk of the cruiser, his registration card revealed that his car and the one under observation were the same. Officer Mackey took the car keys found on Katz and was approaching the car when Katz admitted ownership of the car and the theft of the cigarettes. The car was then seached and approximately 256 cartons of cigarettes were found in the back seat and trunk, 96 of which were identified as being from the Safeway Store on Harrison Street and the rest from the Safeway Store at 1525 Wilson Boulevard in Arlington. When Assistant Manager Dewey identified the defendant as the man he had been watching, Katz said he was sorry, and told Dewey he was glad he was caught.

Probable cause to make an arrest without a warrant exists where the facts and circumstances within the knowledge of the arresting officers are sufficient to warrant a prudent man in believing that an offense has been committed or is being committed.[1] Although an arrest cannot

[1]Carroll v. United States, 267 U.S. 132.

be founded upon mere suspicion, evidence required to establish guilt is not necessary.[2] Here we have more than mere suspicion: Positive identification of the suspect by a customer—his presence in the store—missing stock of certain brands of cigarettes—Safeway cigarettes, partially covered by bags, were found on the back floor of a locked car in the customer parking lot—suspicious activities on the part of the defendant in circling the area—his reluctance to return to his car—and loitering in a nearby phone booth.

Under these circumstances the arresting officers had probable cause to arrest Katz without a warrant, and the Court so finds.

Contee v. United States, 215 F.2d 324 (D.C. Cir. 1954), relied upon by the defendant, is not in point. There the arresting officer, acting on a completely uncorroborated tip by an identified informer, arrested the defendant at his home without a warrant. His sole source of information was the statement that Contee "was the party that had been involved in some robberies." Here the information given the manager by the customer was amply corroborated prior to the arrest.[3]

The search of the car and the defendant was incident to a lawful arrest. Both were reasonable and lawful absent a search warrant.[4] Further, the search was not made until after the defendant admitted the theft and ownership of the car under observation. Safeway cigarettes (fruits of the crime) were plainly visible in the back of the car.

Finally, the defendant claims the trial court erred in denying his motion to exclude statements made by him to

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[2]Draper v. United States, 358 U.S. 307.
[3]Draper v. United States, supra; United States v. Irby, 304 F.2d 280 (4th Cir.).
[4]United States v. Rabinowitz, 339 U.S. 56; Carroll v. United States, supra.

the police officers at the time of the arrest on the ground that he had not been advised of his constitutional right to silence. This contention is without merit. The statements complained of were voluntary admissions of guilt made by the defendant. There was no duty upon the arresting officer to warn the defendant that an admission they did not know he was about to make could be used against him.[6]

The petition for writ of habeas corpus will be DENIED.

/s/ OREN R. LEWIS
United States District Judge

January 31, 1964

[6]Fuller v. Commonwealth, 201 Va. 724, 113 S.E.2d 667; Mendoza v. Commonwealth, 199 Va. 961, 103 S.E.2d 1; see Culombe v. Connecticut, 367 U.S. 568.

APPENDIX C

[Right to Speedy Trial, Witnesses, etc.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. Amendment VI of THE UNITED STATES CONSTITUTION.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. UNITED STATES CONSTITUTION, Amendment XIV: Section 1: *Citizenship Rights Not To Be Abridged by States.*

APPENDIX D

HOWARD SNYDER

was called by and one behalf of the Plaintiff and, having been previously sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. HASSAN:

Q. Will you please state your name, sir?
A. Howard Snyder.
Q. What is your address?
A. 1715 Tro[redacted] Street.
Q. Mr. Snyde[redacted] what is your occupation?
A. I am a Safeway manager at Lee Highway and Harrison Street.
Q. Directing you attention to on or about the 29th day of September, did there come a time when you had occasion to see this defendant, Mr. Katz?
A. Yes, sir.
Q. And where and when did you first see him?
A. I first saw him standing beside the cigarette display. When a customer called my attention . . .
MR. PERRY: I am going to object to any conversations about a customer, Your Honor.
MR. HASSAN: No testimony about any conversations.
THE COURT: Go ahead.

BY MR. HASSAN:

Q. And where is this cigarette counter located?
A. It is near the front of the store, right in the center.

Q. The store is located where, Mr. Snyder?

A. 2300 North Harrison Street.

Q. That is in Arlington County, Virginia?

A. Yes, sir.

Q. Now, after your attention was called to this defendant, what did you do, if anything, sir?

A. I watched this gentleman and watched his movements and I went to the phone and called Officer Harding.

Q. Then what did you do, sir?

A. Officer Harding came down right away and we gave him a description of the man and he went out on the parking lot.

Q. Did there come a time when you observed a vehicle which was identified subsequently as belonging to this defendant?

A. Yes, sir.

Q. Where was that vehicle, sir, when you first saw it?

A. It was right on the south side, near the Lee Highway side.

Q. Was it next to the building, sir, or in one of the parking bays in the middle of the lot?

A. In one of the parking bays in the middle of the lot.

Q. With reference to that location and the door on the Lee Highway side of the Safeway, how far was the vehicle?

A. I would say approximately 50 feet.

Q. About 50 feet?

A. Yes, sir.

Q. Now, between that door and the vehicle, in the vicinity of the area between that door and the vehicle, was there a public telephone booth?

A. Between the building and the car?

Q. Yes, sir.

A. No, sir.

Q. Is there a phone booth at the Safeway Store?

A. Yes, sir.

Q. Where is it located?

A. That is on the north side of the building, right by the door.

Q. On the north side of the building right by the door?

A. Yes, sir.

Q. Now, when you observed the defendant's vehicle, did you approach it?

A. I went over to the car, yes, sir.

Q. Did you look in the car?

A. Yes, sir, I did.

Q. What did you see, if anything?

A. I saw these bags, several bags sitting on the floor.

Q. Whereabouts in the car was that?

A. In the back, on the back seat, on the back of the floor.

Q. Back seat floor board?

A. Yes, sir.

Q. Now, did you ascertain at that time what was in those bags?

A. Well, I figured they were what I thought it was. Cigarettes.

Q. You at that time figured they were cigarettes?

A. Yes, sir.

Q. Did there come a time when you had occasion to examine the contents of those bags?

A. Later on, yes, sir.

Q. And what did you find them to be?

A. Found them to be our cigarettes.

Q. How did you know they were your cigarettes?

A. They have our store number on them, 764.

MR. PERRY: If it pleases The Court I am going to object at this point to the testimony on the grounds that this evidence was seized illegally, without warrant, and I assign the same argument to this as I did on the motion to suppress formally.

THE COURT: All right, sir. As I understand your objection, Mr. Perry, that it is inadmissible on the ground it was illegally seized.

MR. PERRY: Yes.

THE COURT: Seized as a result of illegal search. And the ground for it were set up in the memorandum filed with The Court and argued before The Court.

MR. PERRY: Assign that same argument to the objection at this time.

THE COURT: Your objection is overruled.

MR. PERRY: Would you note my exception?

THE COURT: I show your exception.

MR. PERRY: Same exception as I did on the motion, if it pleases The Court.

BY MR. HASSAN:

Q. And I believe you said that the cartons of cigarettes contained your store number. Was that 764?

A. 764.

Q. 764?

A. Yes, sir.

Q. Now, how many cigarettes did you identify, how many cartons of cigarettes did you identify as coming from your store?

A. Well. Officer Harding identified them later on, all of them.

Q. He identified all of them?

A. Yes, sir.

Q. Did there come a time in your presence when there was any conversation with this defendant concerning those cigarettes?

A. Not in my presence, no, sir.

Q. Not in your presence.

Mr. Bailiff will you ask Mr. Jones to bring those cigarettes in?

THE BAILIFF: Yes, sir.

Q. Now, Mr. Snyder, were you alone or was there somebody with you when you made these observations?

A. Mr. Dewey, the assistant manager, was out on the lot with me.

Q. He was on the lot with you?

A. Yes, sir.

Q. Did there come a time when you made any examination of these cigarettes yourself?

A. All the ones I saw were in the back on the floor board; the rest, the remaining cigarettes, were in the trunk of the car.

Q. Did you see them in the trunk of the car?

A. I saw them later on. They raised the trunk, the lid, yes, sir.

Q. Did you examine those cigarettes at that time?

A. I did not.

Q. Now, will you go look at that and find a carton showing us where the number is located and what the number is?

A. Yes, sir. 764.

Q. 764?

A. Yes, sir.

Q. That came from your store?

A. Yes, sir.

Q. Now, what is the value of that carton of cigarettes?

A. This particular carton is $2.29.

Q. Do you know what the value was of the 69 cartons that contained your store number?

A. They varied in variety. Some $2.17, some $2.27, some $2.29.

Q. Have you arrived at a total value in connection with the assortment of the 96 cartons of cigarettes?

A. No; this is the first time I have seen them since. I didn't know exactly how many $2.17, $2.27, $2.29 there were.

Q. Did the total value of 96 cartons of cigarettes from your store exceed $5.

A. Yes, sir.

Q. By very much?

A. Quite a bit, yes, sir.

Q. Now the regular cigarettes sell for how much?

A. $2.17.

Q. $2.17. The king size?

A. $2.27 and $2.29.

Q. $2.27 and $2.29.

A. Yes, sir.

Q. And you don't know how many cartons of either variety there were?

A. Not of each one, no, sir.

Q. Now, you go back to the stand, please, Mr. Snyder. When you first observed the defendant by the cigarette counter, did you notice anything unusual about that?

A. About what?

Q. About your counter, the cigarette counter?

A. Just shortly afterwards, yes, sir; after my attention was called to it I did, yes, sir.

Q. What did you observe at that time?

A. Certain varieties were very low in stock.

Q. What is the procedure in your store for stocking the shelves such as the cigarette shelf?

A. We usually stock it daily.

Q. Stock it daily?

A. Sometimes twice a day.

Q. Sometimes twice a day?

A. Yes, sir.

Q. When had this been stocked prior to the time that your attention was called to the defendant?

A. I don't know the exact hour but it was Saturday, a.m., the 29th.

Q. Saturday a.m.?

A. Yes, sir.

Q. When you observed it, it was unusually low?

A. Yes, sir.

MR. HASSAN: I have no further questions of this witness.

CROSS EXAMINATION

BY MR. PERRY:

Q. Mr. Snyder, what was the defendant doing again when you first, your attention was first drawn to him?

A. Standing by the cigarette display, in the aisle right beside the cigarette display.

Q. What was he doing.

A. He had a bascart standing there.

Q. Just standing there?

A. Standing there at that particular time, yes, sir.

Q. Did you observe him after that?

A. Yes, sir.

Q. What did you observe him do after that?

A. He stayed in the store for sometime. He went up and down the aisles.

Q. Did he buy things up and down the aisles?

A. These few items he had, including two cartons of cigarettes—two, I think, one or two. He finally after we was observing him, Mr. Dewey the assistant manager and myself, finally came to the check stand and got checked out with those few items.

Q. Did he pay for those items?

A. The few he had.

Q. Did you see him take any cigarettes from your store?

A. I didn't.

Q. That he did not pay for?

A. I didn't actually see him carry them out.

Q. Did you personally see him take any cigarettes from that store?

A. Not personally, no, sir.

Q. You were acting on the information of a second party, were you not?

A. My attention was called to this gentleman.

Q. Do you know who that party is?

A. I don't know their names, no, sir.

Q. Have you seen them since?

A. Not to my knowledge.

Q. Did you know him before, had you ever seen the party before?

A. The customer?

Q. Yes.

A. I think I have on occasions, yes.

Q. Now, Mr. Snyder, as to the value of the cigarettes, the value that you have given The Court is a retail value, isn't it?

A. That's correct.

Q. How much did Safeway Stores pay for those cigarettes?

A. I do not know.

Q. You don't have any idea?

A. No, sir; very small mark-up in cigarettes, but I don't know the exact wholesale price. Everything is billed to the store at retail price.

Q. Could it be a dollar?

A. No: more than that, sir.

Q. Mr. Snyder, you say that your store was stocked on Saturday morning?

A. Yes, sir.

Q. How many cartons of cigarettes did you put in there on Saturday morning?

A. I don't know the exact count but it would vary; six—seven—eight hundred cartons when the rack is completely full.

Q. Who stocked it?

A. I don't know the particular employee that morning —different ones.

Q. How many cigarettes do you generally sell on a Saturday?

A. I don't know exactly. I know for-the-week sales but I don't know daily sales. It varies.

Q. Do you know the particular week's sale?

A. Not exactly, but I can get it.

Q. Is there anything about that number that you can tell when those cigarettes left your store?

A. When they left?

Q. Yes.

A. Not exact date, no, sir. Exact time, I mean.

Q. Is there anything on this carton of cigarettes that would show when the cigarettes arrived at your store?

A. No, sir.

Q. Is there anything on the carton that would show when they left?

A. No, sir.

Q. Well isn't it a fact, Mr. Snyder, that a carton of cigarettes could have left your store a month before it was found in the car?

A. No, sir.

Q. Why couldn't it?

A. We have better turn over than that in merchandise.

Q. But there is nothing about this carton of cigarettes that you can identify as having been taken on Saturday, isn't that correct, on the Saturday the 29th of September?

A. That would be correct on that, yes, sir.

Q. If a like carton was taken from that store on the 29th of October, wouldn't it look just the same?

A. More than likely be a different code number on there from the cigarette counters.

Q. What is the code number on this?

A. I don't know the code number.

Q. Where is the code number on it?

A It is on the carton.

Q. Show the jury the code number.

A. It is a packing date. I don't know all of these things. This happens to be it right here.

Q. W-2?

A. I don't know exactly what that is, the cigarette company puts that.

Q. Wasn't that put on there by your employees, W2?

A. No, sir, the 764 was put on by my employees but not that.

Q. How often do these code numbers change?

A. I do not know that, sir.

Q. Why couldn't it have been a like code number on there in October?

A. The cigarette representatives come around once a week and they check these numbers. If there is over stock there, they pull them out.

Q. Mr. Snyder, you say it was stocked on Saturday morning?

A. Yes, sir.

Q. And you say you don't know how many cigarettes were stocked that particular Saturday morning?

A. Not exactly, no, sir.

Q. But you say that the shelves, some of the stock was low?

A. Yes, sir.

Q. And how did you determine that the stock was low, Mr. Snyder?

A. My attention was called to this. I walked over and looked and several brands were practically all gone.

Q. Was that at the time that the defendant was in the store?

A. Yes, sir.

Q. Now, Mr. Snyder, do you recall testifying here on December 19?

A. Yes, I do.

Q. You are the same Mr. Snyder?

A. Yes.

Q. Didn't you testify at that time, Mr. Snyder, that you went out into the parking lot and were shown the cigarettes and came back and then checked your stock. Wasn't that what you testified to?

A. I am not sure about that. I checked them before I went out or after I came back. It could have been both.

Q. You have been very positive here and you remembered on the 19th. Which one was it?

A. 19th of what?

Q. 19th day of December. Which is correct?

A. I am not certain whether I checked before or I went out or after I came back.

Q. On the 19th of December, Mr. Snyder, you testified that—that is over a month ago?

A. Yes, sir.

Q. That you went out into the parking lot and cigarettes were drawn to your attention and you went back and your stock was low. Do you recall testifying to that effect?

A. That is possibly right.

Q. Your memory would have been a little better on the 19th than it would have been today, wouldn't it?

A. That is possible.

Q. As a matter of fact, the reason you thought it was low was because it was brought to your attention that some cigarettes were missing?

A. Yes, sir. When I checked it, it was very abnormal for several kinds to be practically all gone.

Q. Would you have considered the inventory low if you didn't know there was no cigarettes missing?

A. If I would have walked by and noticed it, which I spent a lot of time up front, I probably would have, yes, sir.

Q. But you didn't notice it this particular day?

A. Until my attention was called to it.

Q. 96 cartons missing from there?

A. I haven't taken count myself, but from the officer, that is what I understand it is, 96 cartons.

Q. How many cartons of Newport were taken?

A. I do not know.

Q. How many cartons of Winston were taken from your store?

A. I don't know the exact count. Just total number.

Q. Well, Mr. Snyder, how do you conclude then, that your stock was abnormally low it you don't know the number of cigarettes missing?

A. Officer Harding took care of the case, he handled . . .

Q. I am not asking Harding; I am asking you. How do you conclude that your stock was low when you don't even know how many were missing?

A. I can't tell exactly how many but I can look and see if it is normal or abnormal because I have been doing this for a number of years. I keep fairly close check on this.

Q. How many cigarettes did you sell that particular Saturday?

A. I don't know the exact amount.

Q. Couldn't the sale of cigarettes have accounted for it on Saturday, being low?

A. Beg pardon?

Q. Couldn't the sale of cigarettes have accounted for this stock being low?

A. Not this low, no, sir.

Q. Well now, how low is "this low", let's go back to that?

A. On a couple of particular brands they were practically all gone, maybe three of four or five cartons left.

Q. What brands?

A. The main one I can think of is Pall Mall or Paul Maul, whichever you prefer.

Q. How many cartons were left there?

A. Left on the rack?

Q. Yes, sir.

A. Left on the rack?

Q. Yes.

A. Just a small number; four, five, six cartons.

Q. How many were there that morning?

A. The rack when full holds thirty or thirty-five cartons.

Q. How many were put there that morning?

A. I don't know the exact number, sir.

Q. You don't know whether 35 or 50 were put there that morning, do you?

A. If we have enough on hand we usually fill it up and when it is full it holds 30 or 40 cartons, double row.

Q. Did you personally stock the stand?

A. I did not.

Q. Who did stock the stand?

A. I am not sure of the exact employee that morning.

Q. Who did you tell to stock the stand?

A. Just depends on who is on the early shift. I have certain ones. They know what to do.

Q. When was the first time you checked the cigarettes after it was stocked?

A. When I came to work approximately 8:30 o'clock the stand was in very good shape.

I had crews that work around the clock over there and I just can't—they take care of certain things. I can't be there all the time.

APPENDIX E

JAMES W. BRENT

was called as a witness by and on behalf of the Plaintiff and, having been previously sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. HASSAN:

Q. Will you please state your name, sir, and your address?

A. James. W. Brent. Business address, 1525 Wilson Boulevard.

Q. What is your occupation, Mr. Brent?

A. Safeway Manager.

Q. Directing your attention to on or about the 29th day of September, 1962, did there come a time when you had occasion to examine some bags of cigarettes?

A. Yes, sir.

Q. Where did you examine them?

A. In the police department.

Q. When you examined them, what did you observe about them, if anything, sir?

A. I observed on the end of them that they had my store number, which was 820, plus the address on the end of it. I have the stamp in my pocket which we use to stamp those cigarettes.

Q. Mr. Brent, would you go look at these packages, these 16 bags of cigarettes and find just one—one will be sufficient—with the markings to which you are referring so we can show it to the jury.

A. Here you are, sir.

Q. What does it say on that stamp, sir?

A. It has Safeway Stores on it, 820. 1525 Wilson Boulevard, the same as this.

Q. That is the same as that. Those are the markings you place on cigarettes in your store?

A. Yes, sir.

Q. Now, did there come a time when you had occasion to see this defendant in your store?

A. No, sir, I did not.

Q. How many packages, how many cartons of cigarettes did you identify as having come from your store, sir?

A. 160 cartons.

Q. What is the value of the 160 cartons?

A. Well, it is three prices: $2.17, $2.27, $2.29. Figuring it at the lowest price of $2.17, it is about $347.

Q. Thank you, sir.

MR. HASSAN: No further questions.

CROSS EXAMINATION

BY MR. PERRY:

Q. Mr. Brent, where is there anyway that you can tell when these cigarettes arrived at your store?

A. It has a date on them but I do not read them. I do not know what they are.

Q. From looking at the cigarettes you couldn't tell when your Safeway Store obtained these cigarettes?

A. I can't, no, sir.

Q. From looking at this carton of cigarettes you can't tell whether it was sold or not, is that correct?

A. No, sir, I cannot.

Q. You can't tell the day or the month that that carton left your store?

A. I can't, no, sir.

Q. Can you testify of your own knowledge whether or not this man stole the cigarettes from you?

A. No, sir, I cannot.

Q. To your knowledge, he did not steal them, did he?

A. They are my cigarettes. That is all I can testify to.

Q. Do you work on the checkout counters?

A. No, sir.

Q. Could he have purchaser them, to your knowledge?

A. That amount, I would say, no.

Q. How do you base your answer?

A. Well, because we have detail tapes on our registers, too, and that amount would show up.

Q. Have you checked your tapes?

A. Beg your pardon?

Q. Have you checked your tapes?

A. I have since then, yes, sir.

Q. You never sold that amount of cigarettes?

A. No, sir.

Q. But you could have sold that amount of cigarettes a few at a time, couldn't you?

A. Yes, sir. But not in one day.

Q. How do you know they come from your store in one day, Mr. Brent?

A. Well, approximately about 3:30 o'clock, in observing my store, between 3:30 and 4:00 o'clock, I noticed my cigarettes were low. I asked one of my employees to refill the rack. I didn't pay too much attention to it until about, oh, 6:00 o'clock that night. I noticed the cigarettes were still low. So I went back.

Q. How many cigarettes did you have in there in the morning?

A. The rack was loaded with cigarettes in the back.

Q. How many did you sell that day?

A. I have no idea.

Q. You said you checked the tapes?

A. Yes, sir. For the large amount of cigarettes sold.

Q. How would you determine on one of the tapes that you had sold a large amount of cigarettes?

A. Because of having a $300 to $350 order.

Q. You didn't have any such order, did you?

A. No, sir.

Q. But you could have very well have sold the cigarettes a few cartons at a time and you would not have noticed it on the tape?

A. That's correct.

MR. PERRY: Thank you.

THE COURT: Step down.

(Witness steps down.)